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No. 95-1445

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES ex rel. HAROLD R. FINE,

Petitioner,

vs.

CHEVRON U.S.A. INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The False Claims Act (31 U.S.C. § 3729 *et seq.*) provides that a person may not maintain a *qui tam* action based upon publicly disclosed information unless that person was "an original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" in turn must have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

The question presented is: When petitioner investigated fraud and reported the information obtained to the government, as mandated by law and the express terms of his employment duties as an auditor in the Inspector General's Office, did petitioner "voluntarily" provide the information to the government so as to qualify as an "original source"?

RULE 29.6 LIST

Respondent Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation, which has issued shares to the public. Chevron U.S. A. Inc owns a percentage interest in Atlas Supply Company and Pembroke Capital Company, Inc., both of which issue shares to the public. Felix Oil Company, a subsidiary of Chevron Corporation, has also issued shares to the public.

Respondent Williams Brothers Engineering Company ("Williams Brothers"), and its subsidiaries and affiliates, have not issued shares to the public. Williams Brothers' parent company, Fluor Daniel, Inc., is a privately held company. Fluor Daniel's parent, Fluor Corporation, is a publicly held corporation.

Respondent Bechtel Petroleum Operators, Inc., and its parent companies, subsidiaries, and affiliates, have not issued shares to the public.

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STATEMENT OF THE CASE

Only one issue is presented in this case: application of the False Claims Act requirement that to be an "original source" a person must have "voluntarily provided" information to the government in order to maintain a *qui tam* action when, prior to the filing of the action, there has been public disclosure of the information upon which the action is based.

It is undisputed that petitioner, an auditor in the Inspector General's Office, was required — by law and by express terms of regulations governing his job duties — to investigate fraud and to make reports of his investigations to his employer, the government. It is also undisputed that the information upon which petitioner based his *qui tam* action was acquired in the performance of his job duties and that it was publicly disclosed prior to the filing of the action.

The Ninth Circuit determined only that, when petitioner acted under compulsion of law and his job duties, he did not "voluntarily" provide information. Other issues discussed in the petition — in particular, whether employees of the Inspector General's Office can *ever* act as *qui tam* plaintiffs or whether government employees generally should be allowed to so act — were not the subject of the Ninth Circuit's *en banc* opinion.

A. Statement of Facts.

Petitioner, Harold R. Fine, was previously employed as Assistant Manager of the Western Region Audit Office in the Office of Audits of the Office of the Inspector General at the United States Department of Energy (sometimes "OIG"). Fine's duties, responsibilities and powers while working in that capacity are set forth in and controlled by the Inspector General Act of 1978. 5 U.S.C. Appx. 3. By law, the Inspector General

(sometimes "IG") has the duty and responsibility to ferret out fraud, waste and abuse in programs overseen by various government agencies. 5 U.S.C. Appx. 3 § 4(a). As a part of his job duties, Fine was expressly required to document his findings, including any irregularities or illegal acts, and to report those findings to his superiors. Comptroller General Standards §§ 4.34-4.38, 6.46, 7.2-7.3, 7.6, 7.17-7.21.[1]

During his employment by the Inspector General's Office, Fine was responsible for supervising audits of the Naval Petroleum Reserve No.1, Elk Hills, California. The private contractors involved in operating that facility with the government included respondents in the first of these consolidated appeals (9th Cir. No. 93-15012). As Fine admits, these audits were a "part of his job responsibilities" and he "acquired the information upon which he based his amended complaint during the course of his OIG employment." Petition for Writ of Certiorari ("Pet."), p. 5. As Fine also admits, the information at issue "was publicly disclosed," and he therefore "was required under the FCA to demonstrate that he was an 'original source' of the information" (Pet., pp. 5, 6), in particular that he "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

B. Proceedings in the District Court.

Two months after retiring from his auditor duties, Fine filed a complaint under seal in the United States District Court for the Northern District of California.[2] The government subsequently

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1. The Inspector General Act provides that IG audits are to be governed by the Comptroller General Standards. 5 U.S.C. Appx. 3 § 4(b)(1)(A).

2. Fine also brought six other *qui tam* actions soon after retiring from government service: *United States ex rel. Fine v. University of California*, 821 (Cont'd)

declined to participate in the action, and the district court then ordered Fine's complaint unsealed and served on all defendants. Appellees, joined by the government as amicus, filed motions to dismiss under Rule 12(b)(1) and 12(b)(6) on the ground that the district court lacked subject matter jurisdiction over Fine's action because he did not qualify as an "original source" under the Act. The district court ruled that Fine was barred from maintaining the action on the ground that he did not qualify as an "original source," in that he neither voluntarily provided, nor was a direct and independent source of, the information upon which he based his action.

C. The Panel's Opinion.

A panel of the Ninth Circuit reversed, holding that Fine was an "original source" under the Act. *Inter alia,* the panel reasoned that, because (according to the panel) the False Claims Act was intended to "encourage" government employees to "speak up," Fine's disclosures were "voluntary" even though required by law and by the conditions of his employment. App. 39a-40a.

D. The *En Banc* Decision.

The Ninth Circuit granted rehearing *en banc*, vacated the panel decision, and affirmed the district court's dismissal for lack of subject matter jurisdiction. As Fine concedes (Pet., pp. 7-8), the main opinion (joined by seven of eleven judges) held solely that Fine, an Inspector General Office auditor who was compelled by law and his job duties to disclose the results of his

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F. Supp. 1356 (N.D.Cal. 1993) (the case consolidated with the instant case); *United States ex rel. Fine v. Advanced Sciences, Inc.*, CA No. 91-0774-SC (D.N.M.); *United States ex rel. Fine v. The Boeing Company*, CA No. 91-1357 (W.D. Wash.); *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1554 (D. N.M. 1994); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995); *United States ex rel. [Under Seal].*

investigations to his employer — the government, had not "voluntarily disclosed" that information. Fine therefore did not fall within the exception that allows an "original source" to maintain a *qui tam* action when the information upon which the action is based has been publicly disclosed. App. 9a-10a.[3]

Judge Kozinski joined in the majority opinion and also filed a concurring opinion in which he discussed the dissenting opinion's view that "*any* action can be voluntary, even if the actor is subject to severe compulsion." App. 16a (emphasis in original). He pointed out that, although perhaps linguistically permissible, application of such a rule to the False Claims Act would make it objectively impossible to determine the voluntary nature of an act. *Id.* He also underscored why information gathered by Inspector General Office auditors should not be considered "voluntarily provided":

> The government pays salaries calculated to reward them for finding and turning over information about waste, fraud and abuse; it holds out the threat of discipline for failure to fulfill these duties; it imposes criminal sanctions for misusing or suppressing information obtained as part of an investigation.

App. 17a.

Judge Hawkins (also joined by Judge Kozinski) and Judge Trott would have reached a broader result. In two separate

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3. The Ninth Circuit, in ruling that Fine had not voluntarily provided the information to the government, noted that it was unnecessary to consider the district court's alternative holding that Fine was not a direct and independent source. App. 9a.

opinions, they expressed the view that Congress could not have intended that IG auditors be given extra rewards for performing their job duties and that accordingly they should be barred generally from bringing *qui tam* actions. App. 18a-24a.

Two judges who had been members of the original panel dissented. They continued to insist that Fine's reports to the government, even though compelled by law, were "voluntary" acts and that only those "subpoenaed to come forward" would not be acting "voluntarily" under the False Claims Act. App. 26a.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Fine first seeks to obtain this Court's interest by asserting (Pet., p. 12) that the Ninth Circuit's decision is in "direct conflict" with the opinion of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). Fine is wrong. In *Williams*, there had been no public disclosure and, for that reason, the "original source" test did not apply:

> Because we find no "public disclosure" under section 3730(e)(4)(A), Williams's *qui tam* action is not jurisdictionally barred under that section. Therefore, *we need not reach the question of whether Williams was an "original source" of the information that formed the basis of his suit.*

931 F.2d at 1500 (emphasis added). The court also observed that:

> [A] government employee, like any other relator, can be barred from bringing a *qui tam* action if that action is based upon "publicly disclosed" information and the employee is not an "original source" of that information.

Id. at 1501. That, of course, is precisely what occurred in the instant case. The information upon which Fine based his action had been publicly disclosed, and Fine was not an original source.

The Ninth Circuit carefully limited its holding to the facts before it. Because Fine, as an auditor in the Inspector General's Office, "acted in exchange for valuable consideration — his salary — and under an employment-related obligation to do the very acts he claims were voluntary" (App. 10a-11a), his reports to the government were not "voluntarily provided" and he was not an original source. The court expressly declined (App. 11a-12a) to rule upon the issue whether government employees generally can qualify as original sources. The footnoted dictum in *Williams* upon which Fine relies for the purported "direct conflict" (931 F.2d at 1501 n. 14) addresses only that general issue, not the specific issue concerning government employees such as OIG auditors whose specific job duties, by law, are the investigation and reporting of fraud to their employer, the government. There is thus no conflict.

Fine also fails in his attempt to find "important and unresolved issues" arising from asserted "inconsistent and irresolute results" in four decisions by courts of appeals. *See* Pet., pp. 20-21. Two of the four decisions cited by Fine are the Eleventh Circuit's decision in *Williams* and the instant case which, as discussed, present no conflict or inconsistency. The third is the Tenth Circuit's decision in *United States ex rel. Fine*

v. Sandia Corporation, 70 F.3d 568 (10th Cir. 1995). There, the information at issue had been publicly disclosed, and the government had obtained it "without Mr.Fine's assistance." 70 F.3d at 571. In view of Fine's concession in that case that he was not an "original source," the court expressly observed that "we need not engage in an 'original source' analysis." *Id.* at 572. The court also declined to pass upon the broader issue of a potential conflict between the Inspector General Act and the False Claims Act. *Id.* at 570 n. 3.

The fourth decision cited by Fine in this regard, *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), also presents no conflict or inconsistency. In that case, the First Circuit held that, although there was no general bar against government employees acting as *qui tam* plaintiffs, the plaintiff in that case was not an original source when it was his "responsibility, a condition of his employment, to uncover fraud." 913 F.2d at 20. Thus, that decision is in accord with the decision of the Ninth Circuit in the instant case.[4]

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4. Nor do the district court decisions cited by Fine present any conflict. In *United States ex rel. Fine v. M.K. Ferguson Co.*, 861 F. Supp. 1544 (D. N.M. 1994), Fine "basically mimic[ked]" information that had already been publicly disclosed. 861 F. Supp. at 1554. For that reason, he was not an original source, and the court expressly noted that it was therefore unnecessary to determine whether he had "voluntarily provided" the information. *Id.* In *United States v. Stern*, 818 F. Supp. 1521 (M.D. Fla. 1993), there had been no public disclosure and therefore the "original source" test was not involved. 818 F. Supp. at 1522. The unpublished district court decision in *United States v. Enriquez*, No. 90-6105, 1991 WL 236502 (S.D. Fla. 1991), which involved a Department of Health and Human Services special agent and not an OIG investigator as asserted by Fine (Pet., p. 13), did not address the issue of when information is "voluntarily provided" to the government.

II.

PETITIONER MISSTATES THE LEGISLATIVE HISTORY.

Fine refers to three aspects of the legislative history of the False Claims Act. None supports him. Indeed, to the extent that the cited legislative history is relevant, it supports the Ninth Circuit's interpretation of "voluntarily provided" in the "original source" test.

First, Fine places heavy reliance upon a single floor statement by Senator Grassley, a sponsor of the 1986 amendments to the Act. Pet., pp. 13-14. In context, that statement sets forth simply an example, *i.e.*, providing information under compulsion of a subpoena, of what should not be deemed to be "voluntary" under the original source test. As the Ninth Circuit noted:

> On its face, Senator Grassley's statement does not purport to describe the *only* situation in which the voluntary disclosure requirement would bar a qui tam suit following a public disclosure.

App. p. 11a (emphasis by court). In any event, even if Senator Grassley had purported to define "voluntary" in such a circumscribed sense, his statement could not be determinative. As this Court has held, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).[5]

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5. Citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990), Fine asserts that "[t]he statements of Senator Grassley are . . . definitive." Pet., p. 14. It would be surprising indeed if, contrary to this

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Moreover, had Congress intended the limited provision advocated by Fine, it would have utilized express language to that effect, stating for example that a *qui tam* action could be maintained when a party "has provided, other than as compelled by subpoena or civil investigative demand, the information" rather than the substantially broader "has voluntarily provided the information." This is particularly true where, as in the instant case, Congress simultaneously enacted new provisions of the False Claims Act making reference to means of compulsory provision of information. Legislative History ("Leg. Hist."), Pub. L. No. 99-562, False Claims Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess., *reported at* 1986 U.S. Code Cong. & Admin. News, p. 5298; 31 U.S.C. § 3733(a) (relating to "Civil Investigative Demand"); 31 U.S.C. § 3804 (relating to "subpoena"). " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, Fine relies on the original Ninth Circuit panel's assertion that the 1986 amendments to the False Claims Act were intended to cure an asserted "conspiracy of silence" among government employees who failed to report instances of fraud. Pet., p. 14 *and see* App. 40a. In fact, the panel's view of the legislative history was in error. A full reading of the applicable legislative history shows that Congress' concern was with

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Court's observation in *Chrysler Corp.*, a court of appeals were to attribute "definitive" status to the statement of a particular legislator. And the opinion in *Dick* does not do so. Rather, the court cited a comment by Senator Grassley, together with other legislative history, in support of its conclusion that, in order to be an original source, a party must have been a source to the entity that made the first public disclosure (912 F.2d at 17-18) — an issue not involved here.

"*government contractor* employers" and "the conspiracy of 'silence' *among contractor* employees" (Leg. Hist., pp. 5269-71) (emphasis added), not with the government as an employer and a "conspiracy of silence" among government employees.[6] Indeed, "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' " *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *accord: United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1161 (3d Cir. 1991). Fine is not such a person. He was employed to discover and report fraud; he suffered no risks in disclosing it, and he needed no extra incentive to do so.

Finally, Fine contends that the 1986 amendments to the False Claims Act were intended to "correct" the result in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) and that:

> What concerned Congress and what Congress corrected when it enacted the 1986 amendments was the inability of persons to prosecute *qui tam* actions based on information they were required by law to disclose to the government.

Pet., p. 16. There is no support — in either the legislative history

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6. The panel opinion misleadingly set forth, in what appeared to be a single quotation, what were in fact two separate excerpts from the legislative history. *See* App. 40a. The first such excerpt contains the *only* mention of federal government employees in the entire 46-page legislative history. It appears to have been included as the only available statistical evidence of the unwillingness of employees in general to expose illegalities concerning fraud. Leg. Hist., p. 5269. The second excerpt is from a portion of the legislative history two pages later. Leg. Hist., p. 5271. That portion of the legislative history addresses "the so-called 'conspiracy of silence'" identified in the legislative history as "the 'conspiracy of silence' among *contractor employees*." Leg. Hist., pp. 5270-71 (emphasis added).

or case law — for Fine's assertion that, in enacting the 1986 amendments, Congress had a particular concern directed toward persons who were required by law to disclose information to the government. It is, of course, generally recognized that Congress was dissatisfied with the *Dean* opinion's interpretation that barred *qui tam* suits by *all* parties who, prior to filing *qui tam* actions, had provided information to the government. *See* Leg. Hist., pp. 5278-79. Under the initial drafts of the 1986 amendments, *any* person, whether or not required by law to disclose information to the government, could have brought a *qui tam* action if the government had been in possession of the information for six months but had not acted upon it. *See* discussion of legislative history in *Houck on Behalf of United States v. Folding Carton Admin.*, 881 F.2d 494, 504 (7th Cir. 1989); *United States ex rel. LaValley v. First Nat. Bank of Boston*, 707 F. Supp. 1351, 1356 (D. Mass. 1988).

Congress, however, wished to continue to bar "parasitic lawsuits" by persons exploiting information already in the possession of the government. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651, 654 (D.C. Cir. 1994); *United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148, 1157 (2d Cir. 1993). In doing so, it sought to advance the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Springfield, supra*, 14 F.3d at 651.

Accordingly, Congress rejected the broad proposed provisions that would have allowed any person to file a *qui tam* action if the government had not acted within six months. Instead, Congress barred actions based upon publicly disclosed information *except* when the "original source" test was met. Hence, it cannot be disputed that Congress intended to bar *some qui tam* actions by persons who disclosed information to the

government. The issue here is simply application of the "original source" test to the facts of this case; in particular, whether a disclosure by a government employee is "voluntary" when that employee's sole job duties — as compelled by statute and governing federal regulation — were the investigation and reporting of fraud to the government.

As discussed above, the Ninth Circuit correctly decided that such a disclosure is not "voluntary." The broader issues posited by Fine, including application of the "original source" test generally to all persons who may be under some obligation to disclose information to the government, were not the subject of the Ninth Circuit's opinion and are not presented by this case. The precise parameters of the "original source" test will, presumably, be defined in subsequent cases dealing with varying factual situations.[7]

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7. One aspect of the legislative history, not discussed by Fine, indicates that his arguments with respect to disclosures required by law may not be well founded, at least when the person disclosing information was under a legal duty both to investigate fraud and to report the results of the investigation to the government. In the *Dean* case, Wisconsin had relied upon a provision of the 1983 version of the False Claims Act that allowed certain *qui tam* actions when a party had "voluntarily disclosed" the information to the government. 729 F.2d at 1106. The court in *Dean* rejected Wisconsin's reliance on that provision, noting that Wisconsin had been required by statute and federal regulation to investigate and report the fraud at issue. *Id.* The court concluded that "*such information was not, therefore, 'voluntarily disclosed.'*" *Id.* (emphasis added).

Congress was obviously aware of the *Dean* court's conclusion that a party who investigated and provided information under compulsion of statute and regulation did *not* act "voluntarily." With that knowledge, Congress mandated that information must be "voluntarily provided" in order for a person to be an "original source" under the False Claims Act. In light of this legislative history, it appears that, while Congress intended to "correct" *Dean* to allow some *qui tam* actions by persons who had provided information to the

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III.

PETITIONER'S POLICY ARGUMENTS ARE MISGUIDED AND MISDIRECTED.

Fine argues fervently that, for policy reasons, employees of the Office of the Inspector General should be able to act as *qui tam* plaintiffs regardless of public disclosure of the information upon which their actions are based and regardless of the fact that their express job duties required them to supply that information to the government. *See* Pet., pp. 20-21. Fine also argues that application of the "original source" test in varying contexts may have anomalous results. *See* Pet., pp. 15, 18-19.[8]

As discussed, most of Fine's arguments and concerns are

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government, Congress did *not* intend that *qui tam* actions should be maintained by persons who had investigated fraud and provided the information to the government under compulsion of the express requirements of statute and federal regulation.

8. While Fine cavalierly dismisses (Pet., p. 19) the government's policy arguments in support of a sensible reading of "voluntary" (*see* App. 12a-13a) as a "chamber of horrors," he puts forth a "horror" of his own:

> Under the *en banc* majority's holding, government employees such as petitioner would be encouraged to race to the courthouse the instant they suspect fraud against the government so as to avoid the risk of public disclosure of their information rather than, like petitioner, voluntarily bringing their findings to their supervisors (or any other government officials who might listen) in an attempt to have the government take action.

Pet., p. 15. Fine ignores the fact that such action would be a blatant violation of an IG auditor's express job duties.

directed to facts not presented in the instant case. However, even if Fine were in some respects correct (and, as discussed herein, it is submitted that he is not), he should heed his own advice as to the proper forum in which to advance policy arguments. *See* Pet., pp. 18-19. Congress made the "original source" test an integral part of the False Claims Act. Anyone who is dissatisfied with a straightforward application of that test should take his or her case to Congress, not to the courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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